IN THE SUPREME COURT OF TEXAS

NO. 05-0303

THOMAS GRABER AND HOPKINS & SUTTER, PETITIONERS,

v.

RICHARD L. FUQUA, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued January 26, 2006

JUSTICE GREEN delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE O'NEILL, and JUSTICE JOHNSON joined.

JUSTICE WAINWRIGHT filed a dissenting opinion, in which JUSTICE BRISTER, JUSTICE MEDINA, and JUSTICE WILLETT joined.

The question in this case is whether a state malicious prosecution claim is preempted by the federal bankruptcy regime simply because the claim arose out of the filing of an adversary action in a bankruptcy proceeding. We hold that under the facts of this case, Congress did not intend for such a claim to be preempted.

In a Texas trial court, Richard Fuqua alleged that Thomas Graber and Hopkins & Sutter had committed the common law tort of malicious prosecution by initiating an adversary proceeding in Fuqua's federal bankruptcy case. The petitioners argue that federal bankruptcy statutes express

Congress's intent to preempt Fuqua's claim and others like it. But to hold as the petitioners suggest would require us to extract the requisite intent from congressional *silence*, an inference that our preemption jurisprudence does not allow. The petitioners further argue that permitting Fuqua's state malicious prosecution claim would impermissibly threaten the uniformity of federal bankruptcy law. Yet we can identify no such risk. Until Congress clearly says otherwise, preemption of Fuqua's malicious prosecution claim is not warranted. Fuqua's suit should have survived Graber's plea to the jurisdiction.

I

In 1988, Fuqua filed a voluntary Chapter 7 bankruptcy petition in federal bankruptcy court. Several months later, Graber and Hopkins & Sutter (collectively Graber) initiated an adversary proceeding against Fuqua on behalf of their client, Sunbelt Savings, F.S.B. Graber argued that Fuqua had conspired with others to defraud Sunbelt in a previous real estate transaction. According to Fuqua, Graber obtained information in the adversary proceeding and forwarded it to the Justice Department, resulting in a criminal investigation of Fuqua. The bankruptcy judge stayed the adversary proceeding during the investigation. Fuqua was indicted for bank fraud and tax fraud, the case went to trial, and Fuqua was found not guilty on all charges. After the completion of Fuqua's criminal trial, the adversary proceeding resumed. The bankruptcy court granted Fuqua's motion for a directed verdict and entered judgment in his favor. Graber, on behalf of Sunbelt, appealed the judgment to the federal district court, which dismissed the appeal in 1998. No further appeals were taken.

In 2000, Fuqua sued Graber alleging both a claim of civil malicious prosecution based on Graber's filing of the adversary proceeding and a claim of criminal malicious prosecution based on the later criminal indictment. With respect to the criminal malicious prosecution claim, the trial court granted summary judgment in favor of Graber because the statute of limitations had run. Fuqua did not appeal that order. With respect to the civil malicious prosecution claim, Graber filed a plea to the jurisdiction, arguing that the court lacked jurisdiction because federal bankruptcy law preempted Fuqua's claim. Without a response from Fuqua, the trial court granted Graber's plea. Fuqua appealed and the court of appeals reversed, rejecting Graber's argument for preemption and remanding the case to the trial court. 158 S.W.3d 635. We granted Graber's petition for review.

II

When Congress has not expressly commanded preemption, courts recognize two categories of implied preemption: (1) when Congress sufficiently evidences its intent to exclusively "occupy the field," and (2) when the state law conflicts with the federal law by making simultaneous compliance impossible or by creating an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *accord Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001). But because "the categories of preemption are not 'rigidly distinct,'" these semantic categories do not always control. *Crosby*, 530 U.S. at 372 n.6 (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)). "'The purpose of Congress is the ultimate touchstone' in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

Graber does not argue this case as one where the federal jurisdictional statutes have stripped state courts of jurisdiction. Unlike "cases under [the Bankruptcy Code]," over which federal courts possess exclusive jurisdiction, state and federal courts share concurrent jurisdiction over "all civil proceedings arising under [the Bankruptcy Code], or arising in or related to cases under [the Bankruptcy Code]." 28 U.S.C. § 1334(a)–(b). Indeed, a malicious prosecution claim predicated on conduct in an adversary proceeding does not fall within the federal courts' exclusive section 1334(a) jurisdiction. *See Wood v. Wood* (*In re Wood*), 825 F.2d 90, 92 (5th Cir. 1987) ("The [section 1334(a)] category refers merely to the bankruptcy petition itself, over which district courts (and their bankruptcy units) have original and exclusive jurisdiction."). Graber argues that the trial court lacks subject matter jurisdiction because federal law completely preempts the substance of Fuqua's malicious prosecution claim. No matter how categorized, Graber's argument for preemption is reducible to two propositions: (1) Congress intended to occupy the field of regulating abuses of the bankruptcy process, and purposefully chose to exclude state malicious prosecution claims; and (2) state malicious prosecution claims will impermissibly disrupt the uniformity of bankruptcy law. We disagree with both.[1]

In all preemption cases, our analysis must begin with a presumption that Congress did not preempt state law. *Great Dane Trailers*, 52 S.W.3d at 743; *see also Medtronic*, 518 U.S. at 485 ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action."). The presumption applies not

[1] Because we conclude that federal law does not preempt Fuqua's claim, we express no opinion on the separate question of whether preemption would operate to deprive the trial court of subject matter jurisdiction.

only to *whether* Congress preempted state law at all, but also to the *scope* of preemption. *Medtronic*, 518 U.S. at 485; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992). As noted by the United States Supreme Court:

> Under our constitutional system, there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction . . . . States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together.

Kelly v. Wash. ex rel. Foss Co., 302 U.S. 1, 10–11 (1937) (internal quotations omitted). Thus, Congress's intent to preempt must be "clear and manifest" to overcome this presumption. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). Beginning with this presumption, we address Graber's two arguments.

A

In general, federal law does not preempt a state malicious prosecution claim predicated on conduct occurring in standard federal civil actions. *See, e.g.*, *U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 388–94 (3d Cir. 2002). But of course, the claim made in this case is not predicated on a normal suit—it is predicated on conduct occurring in bankruptcy. Thus, the determinative question here is simple: Did Congress intend to produce an exceptional preemption result when it enacted the Bankruptcy Code? Graber argues that the Bankruptcy Code's remedial scheme

evidences Congress's intent to exclusively occupy the field of regulating abuses of the bankruptcy process. But as an initial matter, Graber frames the scope of our inquiry too broadly. The relevant inquiry is not whether Congress contemplated remedies for abuses of the bankruptcy process generally, for that kind of blanket analysis ignores relevant distinctions between various bankruptcy processes, and it undervalues the presumption against preemption. Instead, we must determine the extent to which Congress contemplated remedies for abuse of a bankruptcy adversary proceeding, the particular action on which Fuqua based his malicious prosecution claim.[2]

Bankruptcy Code remedial provisions must be interpreted with reference to their source because Congress enacted the bankruptcy statutes according to two very different methods: some parts were essentially custom-built, others were not. In some places, Congress envisioned the need for unique processes without analogs in general federal litigation. For those areas, Congress created new processes for the specific purpose of bankruptcy. *See*, *e.g.*, 11 U.S.C. § 362 (2000) (automatic stay); *id.* § 301 (voluntary petitions); *id.* § 303 (involuntary petitions). But in many other places, Congress saw no need to treat bankruptcy any differently from general federal litigation. For those areas, Congress either imported existing federal rules or enacted almost identical provisions. *See, e.g.*, FED. R. BANKR. P. 7001–7087 (adversary proceeding rules). Bankruptcy remedies for abuse of process reflect this same dichotomy. When Congress created unique procedures, it simultaneously

[2] The adversary proceeding deserves specific preemption analysis because it is a principal bankruptcy process, separate from the remainder of a bankruptcy case. *See generally* 9 AM. JUR. 2D *Bankruptcy* §§ 22–24, 87, 706, 1229, 3782 (2006); 1 DANIEL R. COWANS, BANKRUPTCY LAW AND PRACTICE §§ 3.15, 3.18 (7th ed. 1998).

created unique remedial provisions. *See*, *e.g.*, 11 U.S.C. § 362(k)[3] (debtor's remedies for violation of automatic stay); *id.* § 303(i) (debtor's remedies for dismissed involuntary petitions). And when Congress merely imported general federal procedures, it simultaneously imported federal law's existing remedial schemes. *See* FED. R. BANKR. P. 9011 (mirroring Federal Rule of Civil Procedure 11); 1 COWANS, *supra*, § 3.15 ("The Bankruptcy Rules covering litigation were not made up specially for bankruptcy. They lean heavily upon the Federal Rules of Civil Procedure.").[4]

Therefore, the question of whether Congress intended to produce an exceptional preemption result when it enacted the Bankruptcy Code produces two answers. In the areas where Congress custom-built bankruptcy law, preemption is more likely because when Congress crafted new, unique provisions, it probably contemplated whether or not to exclude overlapping state law remedial schemes. But in the areas where Congress merely imported existing federal law without any significant change, preemption is improbable because such borrowing does not evidence an intent to change well-settled preemption law.

The issue in this case—remedies for abuse of an adversary proceeding—belongs to the latter category of imported remedial schemes. Graber and the dissent cite Federal Rule of Bankruptcy Procedure 9011 and Bankruptcy Code section 105(a) as evidence that Congress considered the need to remedy abuse of adversary proceedings and decided to exclude state actions for malicious prosecution. But the opposite is true. Congress said very little about remedies for abuse of an

---

[3] The 2005 amendments to the Bankruptcy Code moved this provision from section 362(h) to section 362(k). Pub. L. No. 109–8, § 305(1)(B), (C), 119 Stat. 41 (2005). However, the substance is the same.

[4] "In general, adversary proceedings are more formal and grow ever closer to the litigation mode in other federal courts." 1 COWANS, *supra*, § 3.15.

adversary proceeding, and what little it said in Rule 9011 and Section 105(a) represents an implicit acceptance of state malicious prosecution claims like Fuqua's.

Bankruptcy Rule 9011, like Federal Rule of Civil Procedure 11, addresses the signing of papers and representations to bankruptcy courts and provides standards for the imposition of sanctions upon both attorneys and parties. *See* FED. R. BANKR. P. 9011; FED. R. CIV. P. 11. Because Rule 9011 is almost identical to Rule 11, courts often merge their substantive analysis of the rules. *See, e.g.*, *Citizens Bank & Trust Co. v. Case* (*In re Case*), 937 F.2d 1014, 1022–23 (5th Cir. 1991); *In re Commonwealth Sec. Corp.*, No. 06-30746-SGJ-7, 2007 WL 309942 (Bankr. N.D. Tex. Jan. 25, 2007). It is well settled that the Federal Rules of Civil Procedure, including Rule 11, do not preempt malicious prosecution claims predicated on federal civil actions. *See, e.g.*, *U.S. Express Lines*, 281 F.3d at 393; *Cohen v. Lupo*, 927 F.2d 363, 365 (8th Cir. 1991); *Tarkowski v. County of Lake*, 775 F.2d 173, 175 (7th Cir. 1985); *McShares, Inc. v. Barry*, 970 P.2d 1005, 1014 (Kan. 1998) ("Rule 11 can not abridge the substantive state law of malicious prosecution, nor was it adopted to serve as a surrogate for an action based upon a claim of malicious prosecution resulting from frivolous, harassing, or vexatious litigation."); *Del Rio v. Jetton*, 63 Cal. Rptr. 2d 712, 716–17 (Cal. Ct. App. 1997) ("Nothing in [R]ule 11 indicates an intent to occupy the entire field of groundless suits brought for malicious purpose, nor is there any conflict between Rule 11 and a damages action for such malicious prosecution."). As the Rule 11 advisory committee observed, "Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. . . . *Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process*." FED. R. CIV. P. 11 advisory committee's note (emphasis added). Thus, the

United States Supreme Court is "confident that district courts will resist the temptation to use [Rule 11] sanctions as substitutes for tort damages." *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc*, 498 U.S. 533, 553 (1991).

Despite the fact that Rule 9011 mirrors Rule 11, and that Rule 11 does not preempt malicious prosecutions in normal federal civil actions, Graber still argues that Rule 9011 is evidence of Congress's intent to preempt malicious prosecutions in bankruptcy. The argument must assume that by taking Rule 11—a generic rule of civil procedure that Congress did not intend to have preemptive power, and which the cases hold does not—and placing it in the bankruptcy context, Congress somehow clearly evidenced its intent to give an old rule new preemptive status. This cannot be the case when neither Rule 9011 nor the bankruptcy rules as a whole bear evidence of such a changed intent. Congress did not custom-build this part of bankruptcy law. Instead, the opposite is true—it intended to import the federal rules framework at large. As the Advisory Committee itself said:

> These [Adversary Proceedings] rules are based on the premise that to the extent possible practice before the bankruptcy courts and the district courts should be the same. These rules either incorporate or are adaptations of most of the Federal Rules of Civil Procedure.

FED. R. BANKR. P. 7001 advisory committee's note. Because Rule 11 does not preempt state malicious prosecution claims normally, and because Congress intended to replicate that framework in bankruptcy adversary proceedings, Rule 9011 does not evidence Congress's intent to preempt malicious prosecution claims. Its importation militates, instead, directly against preemption. *See Bates*, 544 U.S. at 449 ("If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly."); *Standard Oil Co. of N.J.*

v. United States, 221 U.S. 1, 59 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary.").

Likewise, Bankruptcy Code section 105(a) does not evidence Congress's intent to preempt malicious prosecution claims predicated on conduct in an adversary proceeding. *See* 11 U.S.C. § 105(a). Section 105(a) is another example of where, instead of custom-building a bankruptcy rule, Congress imported general federal law that does not preempt, and said nothing to change that result. Section 105(a) is located in the "General Provisions" chapter of the current Bankruptcy Code. U.S.C., tit. 11, ch. 1. The substance of this section has existed since at least 1898. *See* Laura B. Bartell, *Contempt of the Bankruptcy Court – A New Look*, 1996 U. ILL. L. REV. 1, 3–4 & n.15 (1996).[5] The section gives bankruptcy courts broad, general police powers:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a).

The United States Supreme Court recognized in *Chambers v. NASCO, Inc.* that federal courts hearing general civil actions possess this same power inherently. 501 U.S. 32, 43–46 (1991). And like Bankruptcy Rule 9011, which Congress imported from federal procedural law at large, section 105(a) is also a direct import. *See Jones v. Bank of Santa Fe* (*In re Courtesy Inns, Ltd., Inc.*), 40

[5] The 1898 Act gave the power to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act." Bartell, *supra*, at 4 n.15.

F.3d 1084, 1089 (10th Cir. 1994) ("We believe, and hold, that § 105 intended to imbue the bankruptcy courts with the inherent power recognized by the Supreme Court in *Chambers.* ") (citation omitted). The broad *Chambers* power does not preempt malicious prosecution claims in normal litigation, and the mere fact that Congress codified that power for bankruptcy cases did nothing to change its preemptive effect. For the same reasons that merely importing Rule 11 does not evidence Congress's intent to create an exceptional preemption result, importing the power recognized by *Chambers* does not either.

In addition to Rule 9011 and Section 105(a), Graber, the dissent, and cases like *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 915–916 (9th Cir. 1996), cite various other Bankruptcy Code provisions in support of preemption. These provisions do not evidence the requisite intent because they address custom-built areas of bankruptcy law, not adversary proceedings, and because they fall far short of evidencing the intent to occupy the *entire field* of sanctions for abuse of adversary proceedings that preemption requires.

Bankruptcy Code section 303 governs the use of involuntary petitions—a unique procedure that allows a person to initiate bankruptcy proceedings without the debtor's consent. 11 U.S.C. § 303(a)–(b). If an involuntary petition is filed in good faith, but dismissed, section 303(i) allows the court to award costs and fees to the debtor. *Id.* § 303(i)(1). If an involuntary petition is filed in bad faith and dismissed, section 303(i) allows the court to award costs, fees, and damages to the debtor. *Id.* § 303(i)(2). Graber and the dissent cite several cases holding that section 303(i) preempts malicious prosecution claims predicated on the filing of an involuntary petition. Indeed, the involuntary petition process is a custom-built area of bankruptcy that Congress crafted anew. *See*

Miles v. Okun (*In re Miles)*, 430 F.3d 1083, 1089–91 (9th Cir. 2005). Thus, it is more likely that Congress considered the need to deter misuse of the unique involuntary petition process it created, and more likely that it intended section 303(i) to be the exclusive remedy. But the process of filing the initial bankruptcy petition is very different from an adversary proceeding. By its own terms, section 303(i) applies only to the filing of an involuntary petition—it cannot apply to the initiation of an adversary proceeding. *See* 11 U.S.C. § 303. Congress did not custom-build the adversary proceeding rules like it did the involuntary petition process. Instead, for purposes of adversary proceedings, Congress merely imported the existing federal scheme, which allows state malicious prosecution claims.

Bankruptcy Code section 362 establishes another custom-built procedure: bankruptcy's automatic stay, which halts almost all types of creditor's actions against the debtor or the debtor's property. 11 U.S.C. § 362. For willful violations of the automatic stay, section 362(k) mandates the recovery of actual damages in cases of good faith, and punitive damages in "appropriate circumstances." *Id.* § 362(k). Section 362(k) sanctions only violations of the unique automatic stay, conduct that occurs outside of the bankruptcy proceedings. Because the automatic stay is another custom-built area of bankruptcy, its sanctions are more likely to preempt related state claims. But this provision does not evidence a preemptive intent related to adversary proceedings because the two areas—regulating the conduct of persons outside the proceeding and regulating the conduct of litigants inside an adversary proceeding—are so unrelated that an intent to preempt in one cannot evidence an intent to preempt the other.

Bankruptcy Code section 930 allows dismissal of a municipality's bankruptcy petition for "cause." *Id.* § 930. This section is not evidence that Congress considered individual remedies for misuse of the adversarial proceedings because this chapter applies to municipalities, not individual debtors' petitions. *See* U.S.C. tit. 11, ch. 9. In addition, section 930 never addresses the actions of outside parties like Graber; it looks only to the petitioning municipality. *See* 11 U.S.C. § 930.

Bankruptcy Code section 1112 governs dismissal of a Chapter 11 bankruptcy case, as well as conversion of a Chapter 11 case to another type of bankruptcy case. *Id.* § 1112. Section 1112 is not evidence that Congress considered remedies for misuse of the adversarial process because the dismissal/conversion triggers address the conduct of the bankruptcy petitioner and the well-being of the estate, not the conduct of outside parties like Graber. *See id.* § 1112(b)(4)(a)-(p).[6]

The last provision Graber cites is 28 U.S.C. § 1927, which deals with an attorney's liability for excessive court costs. This statute cannot support preemption of malicious prosecution claims in bankruptcy cases because it cannot be applied by bankruptcy courts. *See Courtesy Inns, Ltd.*, 40 F.3d at 1085–86 ("the bankruptcy court may not impose sanctions under § 1927") (citing *Perroton v. Gray* (*In re Perroton*), 958 F.2d 889 (9th Cir. 1992)).[7]

Thus, the only broad provisions that apply to adversary proceedings—Rule 9011 and section 105(a)—evidence not an intent to preempt, but rather an intent to preserve the existing framework

---

[6] The 2005 amendments to the Bankruptcy Code moved this provision from 1112(b)(1)–(10) section to section 1112(b)(4)(a)–(p). Pub. L. No. 109–8, § 442(a), 119 Stat. 115 (2005).

[7] *But see* 1 COWANS, *supra*, § 3.16. If section 1927 could be applied, it would be analyzed like Rule 11 above, and would not support preemption. *See Fed. R. Civ. P.* 11 advisory committee's note (presuming that malicious prosecution claims will coexist with the imposition of section 1927 sanctions).

of federal procedure that does not preempt state malicious prosecution claims. In light of the well-established general rule that federal law does not preempt malicious prosecution claims predicated on conduct in federal court, we are unable to find the requisite evidence of an intent to preempt these same claims in bankruptcy.

One final argument concerning Congress's statutory scheme deserves attention. Graber says that allowing malicious prosecution claims may change the incentives for participation in bankruptcy. As the argument goes, a creditor planning on bringing an involuntary proceeding might not do so if the state malicious prosecution claim is available to bankruptcy debtors.[8] Graber says that Congress contemplated the incentives for participation in bankruptcy, and that states ought not be able to alter the balance Congress struck by adding the risk of malicious prosecution. This argument fails for the same reason that the Rule 9011 argument fails. The Federal Rules of Civil Procedure balance incentives and penalties for participation in general federal litigation, and malicious prosecution claims in that context present the same potential to alter litigants' decision-calculus. Yet Congress chose not to preempt the malicious prosecution claim in general federal litigation. To effectuate a change in this result for bankruptcy, Congress must speak more clearly than it has. For these reasons, Graber's claim that Congress intended to exclude malicious prosecution claims from the field of remedies for abuse of a bankruptcy adversary proceeding fails.

B

[8] Even if litigants actually consider such possibilities, there is good reason to doubt that the addition of a potential malicious prosecution action would have any appreciable effect on their decision calculus, particularly in light of what Graber says is an existing comprehensive remedial scheme. We do not impute to Congress such a strained conclusion without clearer evidence.

Graber next argues that preemption is warranted by the risk of disrupting uniformity in bankruptcy. We disagree for two reasons. First, we think the uniformity argument does not warrant preemption because Fuqua's lawsuit will not necessarily affect the law of bankruptcy, be it in Fuqua's particular case or in bankruptcy cases at large. By definition, Texas claims for malicious prosecution arise only after the underlying case reaches a final judgment and all appeals are exhausted. *See Tex. Beef Cattle Co. v. Green*, 921 S.W.2d 203, 208 (Tex. 1996) ("[A]n underlying civil suit has not terminated in favor of a malicious prosecution plaintiff until the appeals process for that underlying suit has been exhausted.").[9] When Fuqua filed his malicious prosecution claim in state court, the bankruptcy court controversy between Graber and Fuqua had reached a final, undisturbable result. A judgment had been entered in the adversary proceeding in favor of Fuqua, the judgment had been appealed, the appeal had been dismissed, and the time for filing any further appeals had expired. *See* FED. R. BANKR. P. 9021–24 (providing final judgment rules); 28 U.S.C. § 158 (providing for federal district court jurisdiction over appeals from bankruptcy court final judgments); *Smith v. Seaside Lanes* (*In re Moody*), 825 F.2d 81, 85 (5th Cir. 1987) ("[I]t is generally held that a separate adversary proceeding within the framework of the overall bankruptcy case is an appropriate 'judicial unit' for determining finality . . . . Thus, even though the bankruptcy case may continue, an order disposing of such a proceeding is appealable as a final order."). Therefore,

[9] In Texas, "[t]o prevail in a suit alleging malicious prosecution of a civil claim, the plaintiff must establish: (1) the institution or continuation of civil proceedings against the plaintiff; (2) by or at the insistence of the defendant; (3) malice in the commencement of the proceeding; (4) lack of probable cause for the proceeding; (5) termination of the proceeding in plaintiff's favor; and (6) special damages." *Tex. Beef Cattle*, 921 S.W.2d at 207.

nothing occurring in the malicious prosecution claim could disturb the matters already decided in Fuqua's adversary proceeding.[10]

Nor can it be said that the adjudication of Fuqua's malicious prosecution claim will affect federal bankruptcy law at large. The element of a malicious prosecution claim that most concerns preemption cases is probable cause, which Graber says might require state courts to interpret federal law. As the argument goes, a state court can never determine whether there was probable cause to bring an adversary proceeding without impermissibly interpreting federal bankruptcy law. But this is not always the case because state courts can determine that an adversary proceeding was brought without probable cause by interpreting *only state law*. Fuqua's situation illustrates this.

Graber's adversary proceeding alleged that Fuqua committed acts of fraud in a financial transaction. In bankruptcy adversary proceedings, "[t]he validity of a creditor's claim is determined by rules of state law," *Grogan v. Garner*, 498 U.S. 279, 283–84 (1991),[11] while issues like

---

[10] The dissent argues that the bankruptcy court has issued no final order closing Fuqua's Chapter 7 case and that, therefore, Fuqua could still petition the bankruptcy court for remedies. Even if this was the case, there is no question that the adversary proceeding, which is the basis of the malicious prosecution claim, has closed and that the time for an appeal has expired. Further, Fuqua's claim is not preempted simply because some remedies may be available in federal court. *See Del Rio*, 63 Cal. Rptr. 2d at 717; *McShares*, 970 P.2d at 1016.

[11] The United States Supreme Court recently reiterated the important role of state substantive law in bankruptcy:

> Indeed, we have long recognized that the basic federal rule in bankruptcy is that state law governs the substance of claims, Congress having generally left the determination of property rights in the assets of a bankrupt's estate to state law. Accordingly, when the Bankruptcy Code uses the word "claim"–which the Code itself defines as a right to payment–it is usually referring to a right to payment recognized under state law. As we stated in *Butner*, [p]roperty interests are created and defined by state law, and [u]nless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.

Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 549 U.S. 443, 451 (2007) (citations and internal quotations omitted). *Cf. Chapman v. Currie Motors, Inc.*, 65 F.3d 78 (7th Cir. 1995) (discussing federal jurisdiction over "an (continued...)

dischargeability are determined by the Bankruptcy Code. *Id.* at 284. Thus, bankruptcy courts first determine whether a claimed act constitutes fraud *under state law*, and if so, they then determine how that act affects dischargeability under federal law. *Id.* at 284 n.10. Suppose Graber made the following assertions in the adversary proceeding:

> Adversary Proceeding Claim Part 1: Under Texas law, Fuqua committed an act of fraud.
>
> Adversary Proceeding Claim Part 2: Because of that fraud, federal law requires that Fuqua's bankruptcy debt not be discharged in manner X for reasons A, B, and C.

To succeed in a later action for malicious prosecution, Fuqua might try to prove there was no probable cause as to Claim Part 2 concerning dischargeability. In that case, the state court would be interpreting federal law. But Fuqua could also win the probable cause element of his state action for malicious prosecution by arguing only the state law elements of Graber's adversary proceeding claim. Fuqua's argument in such a case would look like this:

> Malicious Prosecution Claim Part 1: I concede Adversary Proceeding Claim Part 2—that if there was an act of state fraud, everything Graber says about federal bankruptcy law is correct.
>
> Malicious Prosecution Claim Part 2: But nonetheless, the adversary proceeding claim was malicious because there was *no probable cause for the predicate state law fraud allegation*.

In the above example, the state court would need only determine if Graber had probable cause as to the act of fraud under state law; it would not have to interpret federal law to adjudicate the malicious prosecution claim. In those kinds of circumstances, state courts could not affect the

---

[11] (...continued)
adversary proceeding based . . . solely on state law").

uniformity of bankruptcy laws. Instead, the state law of fraud would continue to control Fuqua and Graber's fate, both in the bankruptcy proceeding and in the malicious prosecution proceeding. Thus, Fuqua could litigate this suit without ever arguing a matter of federal law. We see no threat to uniformity in that situation.[12]

The second reason that preemption is not warranted by the risk of disrupting uniformity in bankruptcy is more fundamental: The uniformity argument for preemption is not triggered by the mere fact that a claim requires state courts to interpret federal bankruptcy law. It is true that, "[p]ursuant to Art. I, § 8, cl. 4, of the Constitution, Congress has power to enact bankruptcy laws that are uniform throughout the United States," *Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 469 (1982), and that in many places Congress has effectively expressed its intention to exclude states from the business of interpreting bankruptcy law. *See* 28 U.S.C. § 1334(a) (providing for exclusive federal jurisdiction for "cases under [the Bankruptcy Code]"); *Yaquinto v. Segerstrom* (*In re Segerstrom*), 247 F.3d 218, 223–24 (5th Cir. 2001) ("It has long been established that federal bankruptcy law determines the scope of a debtor's bankruptcy estate." (citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204–205 (1983))). However, the mere existence of Congress's power to enact uniform bankruptcy laws does not require that Congress actually exercise the power to abolish by preemption all disparate state laws affecting bankruptcy. *See Gibbons*, 455 U.S. at 469. "A bankruptcy law may be uniform and yet 'may recognize the laws of the State in certain

[12] While Fuqua might later raise an issue of federal law, he has not done so yet, and because his pleadings do not "affirmatively negate the existence of jurisdiction," the trial court was required to deny the plea to the jurisdiction. *See County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002). Thus, even under a standard that required total avoidance of federal law, Fuqua's claim should have survived the plea to the jurisdiction.

particulars, although such recognition may lead to different results in different States.'" *Id.* (quoting *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918)). It is precisely because "[b]ankruptcy legislation is superimposed on rights and obligations created by the laws of the States," *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 170 (1946) (Frankfurter, J., concurring), that "uniformity does not require the elimination of any differences among the States." *Gibbons*, 455 U.S. at 469 (citing *Vanston*, 329 U.S. at 170 (Frankfurter, J., concurring)). As one court put it, "because the common law of the various states provides much of the legal framework for the operation of the bankruptcy system, it cannot be said that Congress has completely preempted all state regulation which may affect the actions of parties in bankruptcy court." *Miles*, 430 F.3d at 1092; *see also California v. ARC Am. Corp.*, 490 U.S. 93, 105 (1989) ("Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law . . . ."); 1 COWANS, *supra*, § 3.2(b) ("[N]ot all state laws which undertake to regulate the debtor-creditor relationship are nullified."). There is no more reason to question a state court's aptitude at applying federal law now than there has been for the last two hundred years. *Cf. Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340 (1816) ("[T]he framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction."); *see also Claflin v. Houseman*, 93 U.S. 130, 142–43 (1876). Because Congress has yet to actually exercise its power to unify this aspect of bankruptcy and suppress the disparate state laws of malicious prosecution, the uniformity argument does not warrant preemption.

III

We are not convinced that the Bankruptcy Code evidences Congress's intent to preempt Fuqua's malicious prosecution claim, and we are not convinced that entertaining Fuqua's malicious prosecution claim will impermissibly interfere with the federal interest in uniform bankruptcy laws. Graber's preemption argument simply fails to fulfill the requirements of any recognized category of preemption. Congress did not specifically express an intent to preempt Fuqua's claim, and it did not create a statutory scheme that impliedly requires as much. Allowing Fuqua's claim to proceed in Texas courts neither conflicts with the federal laws that were expressed, nor does it hinder the advancement of the policies embodied therein. Because Congress was silent on the matter, we see no reason to discontinue state law's historic function of providing common law remedies for misconduct in federal courts. To be sure, "it is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide," *Rice v. Santa Fe ElevatorCorp.*, 331 U.S. 218, 230–231 (1947), and this case is no exception.[13] When faced with

[13] Contrary to Graber's suggestion, very few courts have addressed the particular issue confronting the Court today. The vast majority of cases cited by Graber involve involuntary petitions or automatic stays, not adversary proceedings. No matter what these cases say about the custom-built areas of bankruptcy, they do not control our analysis of preemption in the adversary proceeding context. At least two courts generally oppose preemption of malicious prosecution claims predicated on conduct in bankruptcy. *Paradise Hotel Corp. v. Bank of N.S.*, 842 F.2d 47 (3d Cir. 1988); *R.L. LaRoche, Inc. v. Barnett Bank of S. Fla.*, N.A., 661 So.2d 855 (Fla. Dist. Ct. App. 1995). While some jurisdictions hold that bankruptcy statutes preempt malicious prosecution claims predicated on the bringing of an adversary proceeding, *see, e.g.*, *MSR Exploration*, 74 F.3d 910 (9th Cir. 1996); *Glannon v. Garrett & Assocs., Inc.*, 261 B.R. 259 (D. Kan. 2001); *Koffman v. Osteoimplant Tech., Inc.*, 182 B.R. 115 (D. Md. 1995); *Lewis v. Chelsea G.C.A. Realty P'ship*, 862 A.2d 368 (Conn. App. Ct. 2004)*; Ross v. Universal Studios Credit Union*, 115 Cal. Rptr. 2d 712 (Cal. Ct. App. 2002); *Idell v. Goodman*, 273 Cal. Rptr. 605 (Cal. Ct. App. 1990), the opinions of those jurisdictions do not bind us; nor do the arguments that they have accepted persuade us.

such a difficult case, we must err in favor of the states. We affirm the judgment of the court of appeals.

_____
Paul W. Green
Justice

OPINION DELIVERED: January 9, 2009